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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LOS ANGELES COUNTY DEPARTMENT
OF CHILDREN AND FAMILY SERVICES,

Petitioner,

v.

THE SUPERIOR COURT OF LOS
ANGELES COUNTY,

Respondent;

RONALD B. et al.,

Real Parties in Interest.

B236264

(Los Angeles County
Super. Ct. No. CK81552)

ORIGINAL PROCEEDINGS in mandate. Stanley Genser, Judge.

Petition granted with directions.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, Caitlin Crary Taylor, Associate County Counsel, and Jacklyn K. Louie, Principal Deputy County Counsel, for Petitioner.

No appearance for Respondent.

Law Office of Alex Iglesias, Melineh Hatamian and Steven Shenfeld for Real Party in Interest Ronald B.

Children's Law Center of Los Angeles, Patricia G. Bell and Linda Jackson for minor.

INTRODUCTION

The Department of Children and Family Services (DCFS) petitions for a writ of mandate to vacate a juvenile court order awarding unmonitored visitation to Ronald B. (Father) with his son Benjamin F. Benjamin sustained multiple severe injuries, including a skull fracture which occurred while he was in Father's care. Given Father's lack of progress in taking responsibility for Benjamin's severe injuries during an 18-month dependency proceeding, we find that the risk Father posed to Benjamin's physical well-being continued to exist. Father's unmonitored contact placed 22-month-old Benjamin at serious risk of the same or similar harm he suffered during his first four months of life, which outweighed any benefit Benjamin might receive from unmonitored visitation. The danger to Benjamin made the order for unmonitored visitation for Father an abuse of discretion. We grant the petition and order issuance of a writ of mandate directing the juvenile court to vacate the order for Father's unmonitored visitation and to enter a new and different order awarding only monitored visitation for Father.

FACTUAL AND PROCEDURAL HISTORY

The DCFS took three-month-old Benjamin F. into protective custody on March 15, 2010, at Cedars-Sinai Medical Center, following a referral alleging physical abuse by his parents. The attending pediatric physician, Dr. Zuhdi, observed a red line on the front of Benjamin's head. A CAT-scan revealed a skull fracture, and further examination showed that Benjamin had previous injuries: a broken clavicle, two fractured ribs, and a fractured femur. The injuries to the rib cage and left clavicle were 10 to 14 days old. Teri F. (Mother) and Father denied any knowledge of old injuries to their son. Father told police he slipped on a wet floor while holding Benjamin, who might have accidentally hit his head on a kitchen sink as Father fell. Mother, who did not live with Father, did not witness this accident. Dr. Zuhdi acknowledged that Benjamin had been abused and that the perpetrator was unknown.

Father kept Benjamin on Saturdays at his home and brought him back to Mother on Sunday. Father stated that he bathed Benjamin at 7:00 p.m. on March 13, 2010, and fed him a bottle of milk. After another feeding at 10:00 p.m., Benjamin woke at 1:00 a.m., crying and refusing to eat and appearing to be fainting. Father took him to the emergency room. Father said he was unaware of the old injuries revealed by the X-ray examination and that Benjamin showed no sign of any injuries and was alert and playful. Father denied hurting Benjamin and said he had no idea how the injuries occurred.

Dr. Barron, the Pediatric Unit Physician, stated that after his birth at Cedars-Sinai hospital, Benjamin was hospitalized for eight days for a respiratory infection. At that time a bone scan X-ray indicated no fractures. Dr. Barron's primary concern was the old healing injuries to the clavicle, ribs, and right femur, which had happened since Benjamin was previously discharged from the hospital and for which the parents had no explanation. The skull fracture was explained by Father's slip on a wet floor while he held Benjamin, but an eye examination revealed hemorrhaging behind the eyes, which was consistent with child abuse and indicated that Benjamin may have been a victim of Shaken Baby Syndrome. The eye hemorrhaging had no correlation to Benjamin's skull fracture. The skull fracture occurred while Father had Benjamin in his care. Dr. Barron stated that he did not feel comfortable with Benjamin being in Father's care.

When he was 21 years old, Father was arrested in North Dakota for having unlawful sex with a 17-year-old female, and Father was a registered sex offender. In 2002 he was arrested and convicted for failing to register as a sex offender, and was sentenced to probation for three years.

In a jurisdiction/disposition report, Father stated that on March 15, 2011, when he gave Benjamin a bath he was fussy, and Father kept Benjamin in his bath longer than usual to get past the crying. Father stated that after bathing Benjamin he returned to the kitchen for Benjamin's pacifier, where his left foot gave out and he fell. Father said he was not lying on Benjamin when they landed. Father reported that Benjamin's ribs may have been broken when he had a "mirrored dream," turned in the bed, and placed a significant amount of weight on Benjamin's body. Father stated: "I was dreaming of the

exact same situation. In my dream Benjamin was on the other side of the bed. He didn't fully wake up. He didn't cry. He made a loud noise."

A Multidisciplinary Assessment Team Summary and Findings of May 26, 2010, described Father as cooperative and expressing genuine concern for Benjamin. He and Mother were attending parenting classes. Father previously cared for Benjamin on weekends. He was 36 years old, had a degree in exercise physiology from Minot University in North Dakota, and worked as a production assistant in the entertainment industry.

As of May 24, 2010, Benjamin had dysregulation of physiological function, including fussiness and feeding and sleeping problems. He had tantrums, and his activity level and variability was "hypoactive." He reacted to sounds, smells, and sights but could not hold up his head for lengthy periods or grasp objects. He was taking anti-seizure medication for seizure activity. He had difficulty following objects in a vertical and horizontal plane, although he could imitate facial expressions of others. Benjamin did not roll from side to side, which was not typical for an infant his age, and Mother believed this reflected neurological impairment. His concentration appeared impaired in that he focused on the faces of others only for short periods.

On August 2010, Dr. Lynne Ticson of Los Angeles County USC Medical Center outlined Benjamin's injuries. Benjamin had five additional injuries that were not observed or documented at Cedars-Sinai. These included injuries in the right and left humerus (shoulder or upper arm), a left distal femur and tibial fracture, and a right proximal tibial corner fracture. Dr. Ticson stated: "The baby has multiple injuries in different stages of healing; this is the classic definition of the Child Abuse Syndrome." Dr. Ticson observed: "The cerebral bleeds and the bilateral retinal hemorrhages are most consistent with the baby having been severely shaken, or Shaken Baby Syndrome. The retinal hemorrhages are not necessarily associated with the skull fracture. Corner fractures or torus fractures, as well as buckle (bending) fractures are highly suspicious and may be considered pathognomic of child abuse. These fractures are produced when the extremity is held in such a way as to bend the joint to such an extreme, that a small

chip of bone is broken off. These fractures are hard to date because the bony fragment that breaks off is reabsorbed in the joint fluid and does not have a callous formation.” Head trauma had produced a seizure disorder in Benjamin. Dr. Ticson stated that a March 21, 2010, CT scan produced new evidence of bilateral occipital gray matter that likely had “strokes,” due to ruptured blood vessels and a lack of blood and oxygen to the brain in those areas.

Benjamin was in Father’s care when he suffered an “Acute Life Threatening Event.” Father lacked parenting skills and did not know age-appropriate development or have age-appropriate expectations for Benjamin. Father claimed that as a fitness enthusiast, he wanted to build Benjamin’s strength by “exercising” his extremities, and inappropriately insisted Benjamin was a “strong” baby. Father showed lack of insight into Benjamin’s development by “trying to teach the baby not to cry during his bath by holding him down in the water,” and believed he could get Benjamin to enjoy baths by forcing him to lie in the bath. Father claimed he did not hurt Benjamin.

On November 15, 2010, the DCFS reported that Benjamin appeared in good health and continued to live with maternal grandparents. An MRI on June 22, 2010 was normal. Concerns remained about Benjamin’s attention span, although he progressed well in physical therapy because the family worked with him between sessions. Father did not participate in any physical therapy sessions.

An evaluation performed by Marvin Pietruszka, M.D., M.Sc., F.C.A.P. at the request of Father’s attorney stated Dr. Pietruszka’s opinion that Benjamin was a victim of child neglect rather than child abuse.

After an initial Welfare and Institutions Code section 300 petition filed on March 18, 2011, a first amended section petition was filed on September 28, 2010. On December 9, 2010, the juvenile court sustained the allegation that Benjamin was a person described by section 300, subdivision (a), in that on March 14, 2010, at age three months, a medical examination showed that Benjamin suffered a recent fracture of his skull, had bilateral retinal hemorrhages to his eyes, and had healing fractures to his seventh and

eighth ribs, clavicle, and right femur, and had linear erythema¹ to the top front of his head. Father's explanation of how Benjamin sustained these injuries was not consistent with the child's injuries, which were consistent with non-accidental trauma.

On January 5, 2011, Benjamin was declared a dependent child of the juvenile court under Welfare and Institutions Code section 300, subdivisions (a) [child suffered, or there was substantial risk child would suffer, serious physical harm inflicted nonaccidentally by the child's parent] and (e) [a child under age five suffered severe physical abuse by a parent]. The juvenile court found substantial risk to the child if released to Father, ordered custody removed from Father, and ordered Benjamin placed in the home of Mother under DCFS supervision. Father was ordered to participate in individual counseling to address the sustained petition and to participate in parenting class, which the court was informed Father had already completed. Mother was ordered to participate in individual counseling to address case issues and child protection. Father's visitation was to be supervised by the maternal grandmother or any other DCFS-approved monitor.

Father attended individual counseling after July 28, 2010, for anxiety, irritability, and sadness related to being separated from Benjamin. He expressed a strong desire to do whatever it took to be reunited to Benjamin and resume his parenting responsibilities. Father stopped counseling on March 24, 2011, because he felt he had complied with court orders and nothing changed regarding unmonitored visits with Benjamin. Father visited Benjamin every day he was not working, and during visits Father was loving and affectionate and treated Benjamin age-appropriately. On March 29, 2011, Father contacted a DCFS supervising social worker regarding having unmonitored visits with Benjamin.

¹ Erythema: an abnormal redness of the skin resulting from irritation and dilation of the capillaries.

As of July 18, 2011, Mother's therapist reported that Mother understood that Father's actions injured Benjamin and to protect Benjamin she did not feel comfortable leaving him with Father unsupervised. Mother stated that she did not wish to leave Benjamin with Father until Benjamin was verbal and able to communicate his experiences and until she observed that Father had the necessary skills to care for him.

Father resumed individual therapy on July 23, 2011. His therapist was informed that Father needed to address the sustained petition in therapy and provide the DCFS with a progress report as to Father's participation. On September 22, 2011, Father's therapist reported that Father said he previously stated to DCFS personnel that he was not aware of any prior injuries to Benjamin and did not know how they occurred. Father acknowledged possible causes for those injuries and ways to prevent them from occurring in the future.

By August 1, 2011, Benjamin's physician reported that Benjamin's seizure disorder had subsided and he was no longer taking seizure medication.

A contested review hearing took place on September 26 and 28, 2011. Mother sought termination of juvenile court jurisdiction; Father sought termination of jurisdiction and liberalized visitation. Father's therapist, Michele White, testified that Father attended weekly counseling sessions from July 28, 2010, until January 2011, when he became unemployed, and resumed attending counseling in mid-March 2011. White stated that Father accepted responsibility for the injury that occurred to Benjamin. Father, however, told White he was not aware of injuries to Benjamin's seventh and eighth ribs or of healing fractures to Benjamin's clavicle and right femur. Father described Benjamin's skull fracture as the result of an accident in which Father reached for a towel with Benjamin in his arms, slipped on some water, cradled Benjamin, and held Benjamin as he fell. Father stated that a "possible cause" of the injuries he was unaware of was that when he slept with Benjamin, in a dream Father rolled over accidentally without being aware that had happened. White discussed safety issues with Father, and how to make sure Benjamin had a proper bed to sleep in.

Father also testified. He stated that he had completed his parenting class. He stated that he visited Benjamin every day in the morning for about three hours, monitored by Mother or maternal grandmother.

The juvenile court found Mother demonstrated the ability to meet Benjamin's needs without further court intervention or DCFS supervision, and Father was in substantial compliance with the treatment plan. Over the objection of the DCFS, on September 28, 2011, the juvenile court terminated juvenile court jurisdiction with an exit order giving Father and Mother joint legal custody, with primary physical custody to Mother and limited two-hour unmonitored visits for Father, with Father's other visitation to be supervised by Mother or a person approved by her. Mother was given the discretion to further liberalize visitation.

On September 29, 2011, the DCFS filed a request for an order staying the order allowing Father's unmonitored visitation and a petition for extraordinary writ of mandate directing the juvenile court to vacate its order permitting Father's unmonitored visitation and ordering the issuance of an order for Father's monitored visitation. On September 29, 2011, this court stayed the juvenile court order for Father's unmonitored visitation. On January 11, 2012, this court issued an order to show cause why the relief requested in the petition should or should not be granted.

ISSUE

The issue is whether the juvenile court abused its discretion by ordering unmonitored visitation for Father.

DISCUSSION

1. *Standard of Review*

In dependency cases, the juvenile court has the power and responsibility to regulate visitation between dependent children and their parents. The juvenile court must define the rights of the parties to visitation. (*In re Donovan J.* (1997) 58 Cal.App.4th 1474, 1476.) This court reviews a juvenile court order terminating dependency jurisdiction and making a custody (or "exit") order pursuant to section 362.4 for abuse of discretion, and may not disturb such orders unless the juvenile court exceeded the limits

of legal discretion by making an arbitrary, capricious, or patently absurd determination. (*Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 300-301.)

2. The Order for Father's Unmonitored Visitation Is Reversed as an Abuse of Discretion

At three months old, Benjamin was severely injured with a skull fracture while in Father's care. Father explained this injury by saying that he slipped and fell on a wet floor while holding Benjamin, who might have accidentally hit his head on the kitchen sink as Father fell.

Benjamin also had previous injuries, including a broken clavicle, two fractured ribs, and a fractured femur. The injuries were at various stages of healing, indicating that Benjamin had been abused multiple times. The injuries to the ribs and left clavicle were 10 days to 2 weeks old. Benjamin's physician stated that Benjamin had been abused by an unknown perpetrator. Father initially denied any knowledge of these prior injuries. Later, he said that Benjamin's ribs may have been broken when he was having a "mirrored dream," that he was turning in the bed and placed a significant amount of weight on Benjamin's body.

Head trauma produced a seizure disorder in Benjamin, which continued for approximately one year, until August 1, 2011. Benjamin also had bilateral occipital gray matter that was likely due to "strokes" in which blood vessels were ruptured causing a lack of blood and oxygen to the brain in those areas. An eye examination revealed hemorrhaging behind Benjamin's eyes, which was consistent with child abuse and indicated that Benjamin may have been a victim of Shaken Baby Syndrome. The eye hemorrhaging had no correlation to Benjamin's skull fracture.

Father claimed that as a fitness enthusiast, he wanted to build Benjamin's strength by "exercising" his extremities, and was inappropriately insistent that Benjamin was a "strong" baby. Father showed a lack of insight into Benjamin's development by "trying to teach the baby not to cry during his bath by holding him down in the water," and believed he could get Benjamin to enjoy baths by forcing him to lie in the bath.

Over the course of the 18-month juvenile dependency proceeding, Father made no progress in taking responsibility for Benjamin's serious injuries. His understanding of and explanation for those injuries remained the same. Father also showed a lack of insight into appropriate care of Benjamin by "exercising" his infant's extremities and holding him down in the water in order to teach him not to cry during his bath.

At the time of the termination of jurisdiction and of the order for unmonitored visitation, the risk Father posed to Benjamin's physical well-being continued and had not lessened or ended. Unmonitored contact with Benjamin, 22 months old at the time of the September 28, 2011, order, placed him at risk of the same or similar harm he had suffered during his first five months of life. His multiple, severe injuries, some of which occurred while in Father's custody and others of which Father claimed to be unaware, combined with Father's inability or unwillingness to take responsibility for those injuries, left in place a serious risk of physical harm to Benjamin that outweighed any benefit he might receive from unmonitored visitation. This danger to Benjamin made the order for Father's unmonitored visitation an abuse of discretion. We grant the writ petition and reverse that order.

DISPOSITION

The petition is granted. Let a writ of mandate issue directing the juvenile court to vacate that portion of its September 28, 2011, order awarding two hours unmonitored visits for Father, and to enter a new and different order awarding only monitored visitation for Father. Upon issuance of the order awarding only monitored visitation for Father, this court's September 29, 2011, stay of the visitation order is lifted.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.